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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ROBERT RANDALL, Defendant and Appellant.	E035285 (Super.Ct.No. FVA017774) OPINION

APPEAL from the Superior Court of San Bernardino County. Douglas M. Elwell, Judge. Reversed.

Maria Morrison, under appointment of the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Marilyn L. George, Deputy Attorney General, and Janelle M. Boustany, Supervising Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant William Robert Randall appeals from his conviction of possession of an explosive. We conclude that exigent circumstances justified the search of defendant's garage, and the trial court did not err in denying the motion to suppress evidence. However, the evidence is insufficient to support defendant's conviction because the devices he possessed, railroad torpedoes, fall within an exception to the definition of explosives under the governing statutes. Because the conviction must be reversed for insufficient evidence, defendant's other contentions are moot.

II. FACTS AND PROCEDURAL BACKGROUND

Defendant moved to suppress evidence under Penal Code section 1538.5 on the basis that a warrantless search of his home had been unlawful, and the subsequent search warrant was not supported by probable cause. The trial court denied the motion, and the matter proceeded to trial.

A jury found defendant guilty of possession of an explosive (Health & Saf. Code, § 12305) (hereafter, § 12305), a lesser included offense of the charged offense of possession of a destructive device near certain places (Pen. Code, § 12303.2). The jury found defendant not guilty of additional charges of possession of stolen property and attempting to dissuade a witness.

Defendant moved to reduce his felony conviction to a misdemeanor under Penal Code section 17, subdivision (b). The court denied the request, stating that section 12305 is not a "wobbler" offense, and that it therefore had no discretion to reduce the felony to a misdemeanor. The court placed defendant on probation for three years, with the

conditions, among others, that he spend 270 days in county jail and that he not possess or consume alcohol.

A. Motion to Suppress Evidence

Deputy Sheriff James Blankenship testified that on July 6, 2002, he responded to a 911 call, in which the caller reported that a neighbor named Bill at 18448 Stallion Lane in Bloomington was about to detonate dynamite. There was a school directly behind 18448 Stallion Lane and homes on both sides. Blankenship saw defendant standing in his driveway. When defendant saw Blankenship's patrol car, defendant walked over and shut his garage door, leading Blankenship to believe that defendant might have something dangerous in the garage that he did not want Blankenship to see. Blankenship asked defendant if he had anything illegal in the garage, and defendant said he did not. Blankenship then "asked him if he was sure, because the neighbors said that he was lighting off dynamite." Defendant denied that he had dynamite, and when asked if he had any explosives in the garage, he replied, "'Well, there is some railroad torpedoes, but they're nothing more than a little cherry bomb.'" Blankenship was not familiar with railroad torpedoes. He asked defendant to show him, and defendant opened the garage and handed Blankenship a "small square package, 2 inch by 1 and a half inch, red in color, and it was labeled, 'explosive.'" Blankenship set the device on the ground, asked defendant to sit down, asked him for identification, and notified the bomb squad.

Meanwhile, Deputy Sheriff Matt Peterson arrived. Looking into the then-open garage door, Peterson saw a stack of red sticks that appeared to be dynamite on the work bench inside the garage, a few feet from where the deputies were standing. Plastic bags

covered the red sticks, but their ends were visible. Because of the information received in the 911 call, Blankenship believed that the sticks might be dynamite. He entered the garage and pulled up the plastic bags. The red sticks turned out to be road flares or fusees, but the bags contained more railroad torpedoes.

The deputies moved away from the garage, concerned for their own safety and that of the neighbors. They checked to make sure that no one was inside the house, and then they moved away from the house. They used their observations as the basis for obtaining a search warrant, pursuant to which the railroad torpedoes were seized.

Defendant testified that he opened his garage door because the officer ordered him to do so. He denied that he had handed Blankenship a railroad torpedo.

The court found that Blankenship had not conducted custodial interrogation of defendant by asking him if he had any dynamite or explosives. The court continued, "Once Mr. Randall had said, 'Well, I've got something in my garage which is in the nature of a railroad torpedo, something like a cherry bomb,' in response to the question, 'Do you have any explosives,' at that point I think this officer is obligated under the exigent circumstances rule to inquire further as to the nature of the explosives. 'Show me what you have.'" The court accepted for purposes of argument that Blankenship had ordered defendant to open the garage door and show him a railroad torpedo. The court found that once defendant showed the officer an object that was considerably larger than a cherry bomb and that had the word "explosive" or "danger" on the packaging, and when another officer saw something that looked like dynamite, the officers acted reasonably in "attempting to secure or to identify those sticks." The court concluded that

the search was proper based on exigent circumstances, and the court denied the motion to suppress.

B. Trial

On July 6, 2002, Diane Rodriguez, who lived across the street from defendant, called the police because she believed that defendant was about to light off "a little explosive thing." Rodriguez had heard those explosives numerous times before, usually around the holidays and on weekends, at all times of day and night. They were loud enough to make her windows rattle. She had seen defendant tape such a device to a hammer, swing it around, and throw it in the air. The device would then explode when it hit the street.

Deputy Sheriff Blankenship testified to essentially the same facts as at the hearing on the motion to suppress. He further testified that while they were waiting for the bomb squad, defendant told them that he had obtained the torpedoes from his work.

Detective Christopher Ilizaliturri, testified that he was a bomb technician with three years' experience with the Bomb Arson Division and "basic academy" training 20 years ago regarding "explosives, explosive recognition," as well as training at the FBI Hazardous Devices School and the State Fire Marshal's program on arson and explosives recognition and investigations.

Next to the torpedoes in defendant's garage, Ilizaliturri found a hammer that had a fabric tail or lanyard attached with duct tape. He saw 13 torpedoes of two different types in a plastic bag in the garage in addition to the one outside on the ground.

He stated that a railroad torpedo is an explosive device as defined under federal and state law. He explained that the devices are placed on railroad tracks as warning or signaling devices. When a train passes over the device, the device explodes, and the loud report warns the engineer of a hazard ahead on the tracks.

He testified that the railroad torpedoes found in defendant's garage were "both defined in the Federal and State's eyes as explosives." The seized railroad torpedoes were of two types. Ilizaliturri had never seen the larger pink type before, but those "were later identified to [him] by the Federal Alcohol, Tobacco, Firearms Explosive Unit, ATF, as railroad torpedoes possibly coming from Canada."

Ilizaliturri testified that railroad torpedoes are dangerous if used improperly, and they are illegal to possess without proper permits. He testified that railroad torpedoes are regulated by the federal Alcohol, Tobacco and Firearm (ATF) unit "as proper storing" [*sic*]. He stated that these torpedoes were "very much recklessly stored" because they were right next to the fusees (flares).

Ilizaliturri testified that railroads no longer use torpedoes. He also testified that defendant did not have a permit to possess the torpedoes.

Defense counsel began cross-examination by asking, "Is it an opinion or a fact that railroad torpedoes are explosives?" Ilizaliturri replied, "It is fact, sir," and he denied that it was "just an expert opinion" that he had come to. When asked the basis for his testimony, Ilizaliturri replied that a federal regulation identified railroad torpedoes as "Class D" [*sic*] explosives, and "Class D [sic] equates to . . . Division 1.3 explosives in the State of California, . . ." He clarified that state law did not explicitly provide that

torpedoes are explosives, but the "Federal Classification D [*sic*] equates to State Class Division 1.3." Ilizaliturri was allowed to read the following into the record from his notes: "Torpedoes defined as Class B explosives in the Code of Federal Regulation, Title 49 part 173, Section 173.88, subsection D."

He testified that, generally, torpedoes contain about 40 percent potassium chloride, 20 percent sulfur, 20 percent sand, and the remainder neutralizers. He described the actual explosive component as being about the size of a Wheat Thin. When asked if railroad torpedoes are pyrotechnic devices, he stated, "Railroad torpedoes are an explosive."

The director of operations for Union Pacific Railroad testified that the torpedoes were always stored together with fusees on the trains. He testified that although Union Pacific no longer uses them, other railroads continue to use them.

DISCUSSION

A. Request for Judicial Notice

Defendant has asked this court to take judicial notice of the fact that a federal regulation relied on as the basis for the prosecution expert witness's testimony that railroad torpedoes are explosives does not exist. This court reserved ruling on the request for consideration with the merits of the appeal.

Detective Ilizaliturri cited 49 Code of Federal Regulations part 173.88 as the basis for his conclusion that railroad torpedoes are explosives. In connection with the request for judicial notice, defense counsel has provided copies of sequential pages from the Code of Federal Regulations for the years 2001 through 2003 showing that there are no

regulations numbered between 49 Code of Federal Regulations part 173.63 and 49 Code of Federal Regulations part 173.115. We conclude that it is appropriate to take judicial notice of that fact: there was no regulation 49 Code of Federal Regulations part 173.88 in effect for the years 2001 through 2003.

B. Denial of Motion to Suppress Evidence

In the absence of exigent circumstances, a warrantless entry, search, or seizure in a residence violates the Fourth Amendment. (*Kirk v. Louisiana* (2002) 536 U.S. 635; *People v. Bennett* (1998) 17 Cal.4th 373, 384.) The test for whether exigent circumstances exist involves a two-step inquiry: (1) the factual questions regarding what the officer knew or believed and what action he took in response and (2) the legal question whether that action was reasonable under the circumstances. (*People v. Duncan* (1986) 42 Cal.3d 91, 97.) A reviewing court affirms the trial court's factual findings if they are supported by substantial evidence, but the reviewing court determines independently whether the officer's actions were reasonable under the circumstances. (*People v. Duncan*, *supra*, 42 Cal.3d at p. 97.)

We therefore determine whether exigent circumstances justified "'. . . swift action to prevent imminent danger to life or serious damage to property, . . .' [citation], . . ." (*People v. Duncan, supra,* 42 Cal.3d at p. 104, quoting *People v. Ramey* (1976) 16 Cal.3d 263, 276.) In *People v. Kurbegovic* (1982) 138 Cal.App.3d 731, 763-764, the court observed that a motion to suppress evidence would have been meritless because "the 'exigent circumstances' provided by appellant's self-advertised explosives possession and expertise might well have justified the search even as against a proper motion." In

that case, the defendant had made tape recordings threatening further bombing activity, and the court held that the evidence then available provided a substantial basis for believing that explosives were in the defendant's apartment. (*Id.* at p. 763, fn. 27.)

Here, the circumstances presented included the facts that a neighbor had reported that defendant was about to set off dynamite in a residential neighborhood, he had set off explosions before, and he closed the garage door when he spotted the police officer. When the officer questioned defendant about what he had, defendant admitted that he possessed railroad torpedoes, Blankenship, who was unfamiliar with railroad torpedoes, was justified in asking or directing defendant to show him one. Moreover, once the officer had seen the torpedo, which was labeled "Explosive," and when another officer observed what appeared to be sticks of dynamite through the then-open garage door, exigent circumstances existed to justify the officers' entry into the garage. Thereafter, the officers' observations properly served as the basis for a search warrant. We conclude the trial court did not err in denying the motion to suppress evidence.

C. Sufficiency of the Evidence

Defendant was convicted of a violation of section 12305, which provides that "every person not in the lawful possession of an explosive who knowingly has any explosive in his possession is guilty of a felony." He argues that, by definition, the railroad torpedoes were not explosives within the meaning of the statute, and the evidence was therefore insufficient to sustain his conviction.

1. Waiver

The People contend that the issue of whether the railroad torpedoes met the statutory definition of explosives was waived because defendant failed to raise his challenge in the trial court. This court has held that sufficiency of evidence issues are never waived. (*People v. Parra* (1999) 70 Cal.App.4th 222, 224 fn. 2, citing *People v. Neal* (1993) 19 Cal.App.4th 1114, 1121.) [1] Thus, we address defendant's contention on the merits.

2. Standard of Review

"'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citations.]' [Citation.]" (*People v. Parra*, *supra*, 70 Cal.App.4th at p. 225.

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[1] The People rely on *People v. Grayson* (2000) 83 Cal.App.4th 479, 485, in which the defendant was convicted of bringing an explosive into jail in violation of Penal Code section 4574. On appeal, she argued that the trial court had erred in denying her motion for a directed verdict because the ammunition that she had concealed did not qualify as explosives. The court held that the error was waived because the defendant had not raised the issue below. The court nonetheless addressed the issue on the merits and rejected the defendant's claim. (*Id.* at pp. 485-487.) *Grayson* addressed the denial of a motion for directed verdict, and thus is distinguishable from the present case. Moreover, to the extent *Grayson* implies that a claim of insufficient evidence may be waived by failure to raise the claim in the trial court, that position is inconsistent with our own determination of the issue in *Parra.*

3. Statutory and Regulatory Definitions

Defendant contends the evidence was insufficient because the railway torpedoes he possessed are not explosives within the meaning of section 12305. We therefore begin our analysis with an examination of the governing statutes and administrative regulations.

Division 2 of the Health and Safety Code, entitled "Explosives," is divided into two parts: (1) "High Explosives," Health and Safety Code section 12000 et seq. and (2) "Fireworks and Pyrotechnic Devices," Health and Safety Code section 12500 et seq. The types of devices regulated under each part are mutually exclusive. Health and Safety Code section 12001 provides: "This part [High Explosives] does not apply to," among other things, "(c) Fireworks regulated under Part 2 . . . of this division, including, but not limited to, special effects pyrotechnics regulated by the State Fire Marshal pursuant to Section 12555. [¶] . . . [¶] (e) Special fireworks classified by the United States Department of Transportation as division 1.3 explosives when those special fireworks are regulated under Part 2 . . . of this division, when a permit has been issued pursuant to regulations of the State Fire Marshal." Correspondingly, Health and Safety Code section 12540 provides: "The provisions of this part [Fireworks] shall not apply to" "(a) Explosives regulated under Part 1 [High Explosives]."

Although Health and Safety Code section 12001, subdivision (e) refers to "special fireworks," our research did not reveal a definition of that term under any California or current federal statute or regulation. However, the 1990 version of the Code of Federal Regulations contained 49 Code of Federal Regulations part 173.88, entitled "Definition of class B explosives," which provided in pertinent part as follows: "(d) Special

fireworks are devices designed primarily to produce visible or audible effects, or both visible and audible effects by combustion or explosion. Fireworks must be in a finished state, exclusive of mere ornamentation, and must be so constructed and packed that loose pyrotechnic composition will not be present in packages in transportation. Examples of special fireworks are . . . *railway torpedoes*, . . ." (49 C.F.R. § 173.88 (1990).)[2] Thus, under the federal regulatory definition incorporated into Health and Safety Code section 12001, subdivision (e), railway torpedoes are classified as special fireworks, not as explosives.

Foundation for Expert Testimony

Here, to establish that the railroad torpedoes were explosives, the prosecution relied on the testimony of an expert witness, Detective Ilizaliturri.

Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. (Evid. Code, § 805.) However, "[t]here are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law."

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[2] The regulation does not appear in any version of the Code of Federal Regulations after the 1990 version, and the federal regulations no longer use a letter designation for classes of explosives. 49 Code of Federal Regulations part 173.53, entitled "Provisions for using old classification of explosives," provides in pertinent part as follows: "Where the classification system in effect prior to January 1, 1991, is referenced in State or local laws, ordinances or regulations not pertaining to the transportation of hazardous materials, the following table may be used to compare old and new hazard class names:

"Current classification. . . . . Class name prior to Jan. 1, 1991
"
"Division 1.2 . . . . . Class A or Class B explosives.
"Division 1 3 . . . . . Class B explosive.
" "

(*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) "The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." (*Ferreira v. Workmen's Comp. Appeals Bd.* (1974) 38 Cal.App.3d 120, 125-126.) "Although an expert's opinion on an ultimate issue of fact is admissible, and may constitute substantial evidence [citation], the conclusion *by itself* does not constitute substantial evidence without an adequate factual foundation. [Citation.]" (*People v. $47,050* (1993) 17 Cal.App.4th 1319, 1325, fn. omitted; see also *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.) Thus, an expert's opinion is only as good as the foundation on which it rests.

In *People v. Hunt* (1971) 4 Cal.3d 231, the court held that a police officer's expert opinion that the defendant possessed drugs for sale was insufficient to sustain a conviction. The court explained, "Although the officer testified that in his opinion the methedrine was possessed for sale, his testimony in the circumstances of this case may not be held to be substantial evidence to support the conviction. [¶] In *People v. Bassett*, 69 Cal.2d 122, 141 . . . Justice Mosk, speaking for a unanimous court, stated: '"The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion . . . it does not lie in his mere expression of conclusion." (Italics added.) [Citation.] In short, "Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions[.]" (Italics added.) [Citations.]'" (*Hunt,* at p. 237.)

Here, the only basis for the expert witness's opinion that the railroad torpedoes were explosives was a federal regulation that no longer exists. Moreover, an earlier version of that regulation defined railroad torpedoes as special fireworks which are therefore regulated as fireworks, not as explosives, under California law. (Health & Saf. Code, §§ 12001, subd. (e); 12500 et seq.; 49 C.F.R. § 173.88 (1990).)

The People argue that "the bomb expert did not rely on the existence of a federal regulation as the sole basis for his opinion that the items appellant possessed were explosives." However, the record citation the People provide to support this argument is to a discussion between counsel and the court as to admissibility of a defense legal expert to testify that the regulation on which the expert relied did not exist. The deputy district attorney stated, "Detective Izzy [*sic*] said there were several different cross-references, but he did specifically rely on Health and Safety Code Section 12000, which in this case contains a definition of explosives. [¶] That's were we get it from CALJIC, as well as the definition under Penal Code 12000, et sec [*sic*], as well. I don't think Detective Izzy [*sic*] was relying solely on a Federal definition." Our own review of Detective Ilizaliturri's testimony reveals no other basis for his opinion.

The evidence was undisputed that the devices defendant possessed were railroad torpedoes. The statutory definition of explosives explicitly excepts railroad torpedoes, Health and Safety Code section 12001, subdivision (e) and the expert witness's testimony cannot constitute valid evidence to the contrary.

Thus, """. . . upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citations.]' [Citation.]" (*People v. Parra*, *supra*, 70

Cal.App.4th at p. 225.) Defendant's conviction of possession of explosives is not supported by sufficient evidence and must be overturned. All of defendant's other contentions are therefore moot.

DISPOSITION

Defendant's conviction is reversed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

WARD
J.